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Supreme Court of the United States

October Term, 1974
No. 74-1547

AUDREY ELIZABETH NORRIS,
Petitioner,

vs.

CHARLES BAIRD NORRIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of California

A. ALBERT PEERLMAN
McCAFFERTY, PEERLMAN & HOLTZ
1248 Engineers Building
Cleveland, Ohio 44114
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0027

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5 U.S.C. section 8346(a).

10 U.S.C. section 5889.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is not reported, but is attached hereto as Appendix B. The Supreme Court of California, without opinion, denied further hearing.

JURISDICTION

Jurisdiction is invoked under 1257(3), appeal from the judgment and final order of the California Supreme Court made on March 12, 1975, and mandate of said date to the Superior Court of San Francisco County, California.

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THE QUESTIONS PRESENTED FOR REVIEW

(1) Does a Court deny a defendant who resides Two Thousand Five Hundred (2,500) miles from the forum due process of law, when after giving notice on May 6, 1971 that trial would be held on August 16, 1971, thereafter pursuant to a motion to advance the trial filed by plaintiff and at a time when defendant was in a Cincinnati hospital undergoing a serious pelvic operation, bifurcates the lawsuit by advancing the divorce proceedings to July 1, 1971, at which time the Court was apprised that defendant would be physically unable to attend the trial?

(2) Did the State of California, under the Domestic Relations Laws, obviate the necessity of her appearance and right to be heard, when before trial on the merits, the court had determined that conciliation was not reasonably possible?

(3) Is a spouse of twenty-four (24) years, whose husband has accumulated twenty-one (21) years of credit under the Federal Employees Retirement System, denied equal protection of the laws and deprived of property under the Fourteenth Amendment to the Constitution of the United States, when under its precedent the State of California precludes a spouse from presenting evidence at the trial thereof as to the true actuarial value of the pension at such time, for the reason that until the employee retires he has no vested right in the pension?

CALIFORNIA STATE STATUTES INVOLVED

§ 4506. Grounds for dissolution or legal separation.

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

(Added by Stats. 1969, c. 1608, p. 3324 § 8, operative Jan. 1, 1970.)

§ 4508. Irreconcilable differences; findings; order; continuance for reconciliation; consent to legal separation.

(a) If from the evidence at the hearing and contained in the confidential questionnaire, the court finds that there are irreconcilable differences, which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage or a legal separation. If it appears that there is a reasonable possibility of reconciliation, the court shall continue the proceeding for a period not to exceed 30 days. During the period of the continuance, the court may make any order for the support and maintenance of the parties, the custody, support, maintenance, and education of the minor children of the marriage, attorney fees, and for the preservation of the property of the parties. At any time after the termination of such 30-day period, either party may move for the dissolution of the marriage or a legal separation, and the court may enter its judgment decreeing such dissolution or separation.

(b) The court may not render a judgment decreeing the legal separation of the parties without the consent of both parties unless one party has not made a general ap-

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pearance and the petition is one for legal separation. A judgment decreeing the legal separation of the parties shall not bar a subsequent judgment decreeing the dissolution of the marriage rendered pursuant to a petition for dissolution filed by either party.

(Added by Stats. 1969, c. 1608, p. 3324 § 8, operative Jan. 1, 1970.)

STATEMENT OF THE CASE

This case had its inception, when on December 4, 1970, the plaintiff-husband had occasion to file a complaint for divorce in the Superior Court in and for the City of and County of San Francisco and State of California. Service on the wife in Cincinnati, Ohio was made by publication. The wife filed a form of Response, on March 22, 1971, for reconciliation, for division of property, for spousal support and attorneys' fees. In addition, the wife filed a Petition for Reconciliation on May 6, 1971, the same day that the husband gave notice that trial of the matter was set for August 16, 1971. Conciliation was found not reasonably possible, and conciliation proceedings were discharged June 2, 1971.

Nine days after noticing the trial date, the husband requested that the trial date be advanced, and on June 4, 1971, the court advanced the trial date to July 1, 1971.

The wife moved to continue the matter on the ground she could not be in California on July 1, because she would be in an Ohio hospital on that date recuperating from major surgery, and enclosed therein an affidavit from her doctor in support thereof. On June 25, 1971 the court denied the motion for a continuance as to the issue of dissolution and, in bifurcating the trial, continued the matter on the questions of community property and spousal support.

The wife was not present on July 1, 1971, and despite the objection of her counsel that he had not conferred with her and that she could refute jurisdiction, the court granted the Interlocutory Decree dissolving the marriage, and reserved for a future date, jurisdiction to determine the rights of the parties as to support, property, attorneys' fees and all other issues.

A Motion for new trial was made on the ruling of the Court in granting the Interlocutory Decree, which was denied November 9, 1971. Notice of appeal from the Interlocutory Judgment of Dissolution of Marriage was filed December 8, 1971.

On November 11 and 12, 1971, trial was had on the bifurcated part of the case with both parties present. There followed findings of fact and conclusion of law and objections thereto. On May 22, 1972, the court made and settled findings of fact and conclusion of law, and ordered the Interlocutory Judgment re: Property, Spousal Support and Attorneys' Fees, Exhibit "A."

Motion for new trial was made, and the motion was denied July 10, 1972.

From the Interlocutory Judgment re: Property, Spousal Support and Attorneys' Fees, the wife appealed, filing her notice of appeal August 9, 1972 with the Court of Appeals, Fourth District, Second Division of the State of California.

On the 6th day of March, 1975, said appellate court, by written opinion, affirmed the finding and order of the trial court. Exhibit "B."

On the 12th day of March, 1975, the Supreme Court of California, without opinion, denied a further hearing. Exhibit "C." Order date, however, was set for March 12, 1975.

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STATEMENT OF FACTS

The Norrises were married in Washington, D.C., August 22, 1947, when both were college students. Upon her graduation, Mrs. Norris taught school, and Mr. Norris attended law school. Upon his graduation and becoming an attorney in 1949, Mr. Norris became employed by Interstate Commerce Commission, and then by the Internal Revenue Service. They lived in Virginia.

In about 1950, they moved to Cincinnati, Ohio, where Mr. Norris had been transferred by the Internal Revenue Service. Mrs. Norris gave up her employment in Virginia and accepted a job in Hamilton County, Ohio, first as a classroom teacher, and then with the county office of education.

In 1960, Mr. Norris was promoted and transferred by the Internal Revenue Service to Cleveland, Ohio. Mrs. Norris followed, but she was unable to find employment similar to that which she had held in Cincinnati, and in about 1962, she began to get her doctoral degree.

Sometime in 1964, Mr. Norris had an opportunity to go back to Cincinnati as assistant regional counsel with the Internal Revenue Service. Mrs. Norris returned to Cincinnati with her husband to begin her career again. She worked as a full time consultant to the Hamilton County Board of Education and also taught classes at the University of Cincinnati, in education.

In 1964, they purchased their residence on Varner Road, in Cincinnati, Ohio.

In June of 1969, Mrs. Norris received her Ph.D. in Education, and on June 20, 1969, the parties separated. Mrs. Norris continued to live in and maintain the family residence they had purchased in 1964. Mr. Norris remained elsewhere in Ohio until May 22, 1970, when he began the drive to California. He had been in San Francisco in the

early part of 1970, to arrange his transfer to the San Francisco office of the Internal Revenue Service.

Mr. Norris arrived in San Francisco May 30, 1970, and registered at the Best Western Motel. He remained registered there during his entire stay in California, according to his testimony. On June 1, he moved with a friend who had driven with him from Ohio into an apartment at 275 Grandview Avenue, San Francisco.

On December 4, 1970, six months and four or five days after his arrival in California, Mr. Norris executed and filed his petition for dissolution of the marriage. Ten days later he returned to the District of Columbia to confer with his superiors, and on December 22, he was reassigned to Washington, D.C. Mr. Norris remained in Washington, and at the time of his trial he lived in Virginia, in his 22nd year as a federally employed attorney with an annual salary of $27,000.00.

Mrs. Norris, at the time of trial, was employed by the Hamilton County Board of Education, without tenure, earning $16,200.00 annually. She was tenured professor at the University of Cincinnati, where she earned $13.600.00 annually. As a result of both employments, she could earn $25,000.00 per annum.

The physical personal property of the parties and the real property in Ohio were divided substantially equally between the parties by the court.

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REASONS FOR ALLOWANCE OF WRIT

First Premise

In the instant case the trial court found that the petitioner who worked as trial counsel for the Internal Revenue Service was on a leave of absence attributable to his domestic relations problems and for that reason advanced the trial on the divorce only, despite the fact that the court was informed by both affidavit of her attending physician and counsel in Cincinnati, Ohio, of the fact she would not physically be able to attend the trial. A further motion for continuance was made at the trial which was also overruled. The appellate court, in sustaining the overruling of defendant's motion for a continuance, found that although Mrs. Norris was hospitalized and could not attend the divorce trial, she had not made a specific showing (from her hospital bed) as to what evidence would be presented and the nature thereof in view of the fact that the conciliation court had previously found the conciliation of the parties was not reasonably possible. Both the trial and appellate courts did not speak as to why a defendant's appearance in court in the divorce proceeding was not a deprivation of due process, while in the proceedings to divide the property, a personal appearance was essential.

Our point in seeking the granting of certiorari is, that Mrs. Norris was entitled, as a matter of constitutional right, to attend each hearing. And the fact that the conciliation court had previously found the conciliation was not possible should not have precluded her right to a day in court. The trial and appellate courts finding, in effect, was to award Mr. Norris a summary judgment foreclosing to Mrs. Norris, the right to refute the allegations of Mr. Norris.

Our further point is, that a state in the interest of expediency may not bifurcate a trial by making an arbitrary

determination as to which portion of the trial a defendant is to be accorded timely notice of a hearing and reasonable opportunity to attend.

Second Premise

The complainant in this case, Mr. Norris, at the time of trial had been an employee of the Federal Government since 1949. He had, also served some years in the Armed Forces. The evidence disclosed that he had contributed to his Federal Pension some $18,831.00 during the years of coverture. The trial court, on the basis of California case law precedent (*French v. French*, 17 C. 2d 775) refused to permit the introduction into evidence of the current statistical value of plaintiff's contributions to the Federal Civil Service Retirement Annuities, which was believed to be in the area of $165,000.00.

A pension payment serves as a remuneration for services rendered by an employee and if these services were discharged during the marriage any remuneration in the interest of consistency and equity under a state's community property statute must be deemed to be a community asset. It is of no significance nor excuse that the expectancy is vested but unmatured at the time of the marriage dissolution. For a court under its inheritant power and right to continue jurisdiction, can provide for apportionment of the benefits when they become due.

Our point is, that in this marriage of some twenty-four (24) years duration, the most valuable asset acquired during coverture was the present actuarial value of the Civil Service Retirement Annuity and the action of the court in excluding its current actuarial value from its consideration in dividing the community property deprived the defendant of a valuable property right and equal protection of the laws.

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CONCLUSION

This Honorable Court in both construing and interpreting the due process clause under the Fifth and Fourteenth Amendments to the Constitution of the United States, has held that a litigant is entitled to reasonable notice and a reasonable opportunity to be heard. The Superior Court of San Francisco, although fully apprised of her physical condition, deprived her of her constitutional right to attend the trial where the marriage which she wished to maintain would be terminated. The appellate court found that under the circumstances then existing, that the granting of a continuance was within the discretion of the trial court.

Our premise is that the right to reasonable notice and the concomitant right to attend the trial are not matters within the discretion of the court.

Our further premise is, that the trial court in bifurcating the trial, arbitrarily determined that the part of the case relating to the division of property, etc., was of more legal significance than the divorce itself, depriving petitioner thereby of due process of law and equal protection under the Fourteenth Amendment to the Constitution of the United States.

For the reasons contained herein, appellant respectfully prays for an order granting certiorari.

Respectfully submitted,

A. ALBERT PERELMAN
McCAFFERTY, PERELMAN & HOLTZ
Suite 1248—Engineers Building
Cleveland, Ohio 44114
771-0270

Counsel for Petitioner

APPENDIX A

Interlocutory Judgment of the Superior Court of the State of California

(Filed May 23, 1972)

Case Number 625 361

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

In Re the Marriage of

CHARLES BAIRD NORRIS,
Petitioner,

and

AUDREY ELIZABETH NORRIS,
Respondent

INTERLOCUTORY JUDGMENT RE: PROPERTY, SPOUSAL SUPPORT AND ATTORNEYS' FEES

This proceeding was heard on Nov. 11, 1971 & Nov. 12, 1971 before the Honorable Jay Pfotenhauer, Department No. 27.

The court acquired jurisdiction of the respondent on March 22, 1971 by:

Respondent on that date having appeared.

The Court granted its Interlocutory Judgment of Dissolution on July 1, 1971 and this matter came on for hearing as to the remaining matters over which this Court has jurisdiction and as to such matters it is ORDERED and ADJUDGED as follows:

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1. There was no prenuptial or other property agreement entered into by the parties as contended by the Respondent.

2. The following is the separate property of Respondent, AUDREY NORRIS:

a. All Norris Foundation stock;

b. Central Trust checking account—$781.66 and savings account—$84.87;

c. All dogs located at the Varner Road residence.

3. The two 1969 Ford Station Wagons are community property and, after taking into account the loans against each of them, are of equal value. Each party shall retain as his or her separate property the Ford Station Wagon of such party and each shall assume the remaining indebtedness against such car.

4. The clothes and personal effects of each party are of equal value and each is awarded said property as his or her sole and separate property. The Respondent shall arrange to allow Petitioner access to Varner Road residence to pick up his personal clothes and effects therein.

5. The life insurance policies have no cash surrender value and each party is awarded the policies issued on his or her life as his or her sole and separate property.

6. There has been no misappropriation of the community funds by the Petitioner.

7. The Respondent is entitled to reimbursement from Petitioner in the amount of $6,203.00 for sums advanced by her as listed on Schedule "A" and made a part hereof. All other obligation incurred since the date of separation shall be borne by the party incurring the indebtedness.

8. The community property which remains for division is awarded to the parties as follows and that such

constitutes an equal division of the remaining community property subject to Respondent executing a note to equalize as indicated below:

TO THE PETITIONER AS HIS SOLE AND SEPARATE PROPERTY

(a) All the household furniture and furnishings now in his possession;

(b) Cash in Public National Bank accounts, five (5) shares (Aveco) U.S. Savings, (face amount $75.00 and $25.00) Bonds

(c) All right, title and interest in U.S. Civil Service Retirement annunity in the name of CHARLES B. NORRIS;

(d) Note of Respondent.

TO THE RESPONDENT AS HER SOLE AND SEPARATE PROPERTY

(a) All certain real property located at 8100 Varner Road, Cincinnati, Ohio subject to any liens or encumbrances, including mortgage of Tri-State Savings and Loan Company with an approximate balance of $33,670.00. Said real property is more particularly described as follows:

> Situated in Section 4, Town 4, Fractional Range 2, Miami Purchase, Columbia Township, in the Village of Indian Hill, Hamilton County, Ohio, described as follows:
>
> Beginning at a stone monument marked "A" on the plat of survey made by D. S. Hosbrook, recorded in Volume 3, page 163, of the Hamilton County, Ohio, Surveyor's Records; thence along the boundary of said survey South 45° 15′ West, a distance of 378.84 feet to a point "B" as shown on said survey; thence South 29° 15′ East, a distance of 351.12 feet, and South 37° 45′ East, a distance of 203.81 feet; thence South 45°

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15′ West, a distance of 55.20 feet to the place of beginning. Containing 3.055 acres. Being the same premises conveyed to Charles B. Norris and Audrey B. Norris by deed recorded in Deed Book 3441, page 862, Hamilton County, Ohio, Records, together with and subject to all easements, grants and rights set forth and described therein.

ALSO THE FOLLOWING DESCRIBED REAL ESTATE, situated in Section 4, Town 4, Fractional Range 2, Miami Purchase, Columbia Township, in the Village of Indian Hill, Hamilton County, Ohio, described as follows:

Beginning at a point which is North 45° 15′ East, a distance of 55.20 feet from a stone monument marked "A" on plat of survey made by D. S. Hosbrook, recorded in Volume 3, page 163 of the Hamilton County, Ohio, Surveyors Records; thence South 4° 23′ West, a distance of 203.81 feet; thence South 39° East, a distance of 190 feet; thence South 69° 53′ East, a distance of 196.18 feet; thence North 61° 53′ East a distance of 424.59 feet; thence South 57° 15′ East, a distance of 30 feet to the center line of Varner Road, a distance of 171.44 feet; thence South 67° 53′ West, a distance of 339.47 feet; thence North 43° 47′ West, a distance of 144.53 feet; thence North 43° 12′ West, a distance of 360.60 feet; thence South 45° 15′ West, a distance of 211.83 feet to the place of beginning. Containing 4.5 acres. Subject to all legal highways.

Being the same premises conveyed to Charles B. Norris and Audrey B. Norris by deed recorded in Deed Book 3388, page 734, Hamilton County, Ohio, Records, together with and subject to all easements, grants and rights set forth and described therein.

(b) All the furniture and furnishings now in possession of Respondent at Varner Road residence;

(c) All right, title and interest in the Ohio Teachers Retirement Annuity and the Teachers Insurance and An-

nuity Association Contract (TIAA) in the name of AUDREY B. NORRIS:

(d) Savings bonds in Respondent's possession, face value $150.00.

To equalize the above distribution, the Respondent is ordered to execute a promissory note payable to the Petitioner in the amount of $5,904.50 bearing interest at the rate of five percent (5%) per annum on the unpaid principal from January 1, 1973, and said interest shall be paid in semi-annual installments commencing on July 1, 1973 and the next installment January 1, 1974; thereafter on January 1st and July 1st of each and every year. The total interest and principal shall in any event be paid in full no later than January 2, 1976 or upon the earlier sale of the real property known as 8100 Varner Road, Cincinnati, Ohio. Said note shall be secured by said real property and an appropriate mortgage (Deed of Trust) shall be executed by the Respondent to secure the payment with a due on sale clause.

A computation of the note to be given Petitioner to equalize the property so awarded is attached hereto as Schedule "B" and incorporated in this judgment. Said computation allows the Respondent credit for the $6,203.00, amounts advanced for the community, as outlined in Exhibit "A" herein, and referred to in paragraph No. 7 hereof.

9. *Spousal Support*

Petitioner is 50 years of age, employed as a lawyer with Internal Revenue Service and has an annual salary of $27,000.00.

Respondent is 47 years of age, has been employed throughout marriage, holds a Ph.D. in the field of education which provides her with combined annual earnings in excess of $23,000.00. She is also assured of tenure with

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the University of Cincinnati, which alone provides income in excess of $15,000.00 annually.

The income of Respondent is adequate for her circumstances. However, in view of the 22 years of marriage, Petitioner is to pay spousal support in the sum of $1.00 annually subject to the further order of this Court.

10. Petitioner shall pay to Cooper, White & Cooper, as and for Respondent's attorneys' fees, the sum of $3,000.00.

11. The request of Respondent for a medical-psychiatric evaluation of Petitioner based upon her affidavit filed with her counsel's brief is denied.

LET JUDGMENT BE ENTERED.

/s/ JAY PFOTENHAUER
Judge of the Superior Court

Dated May 22, 1972

SCHEDULE "A"

Petitioner to reimburse Respondent for the following advances:

Mortgage payments	$ 5,018.00
Insurance on realty	153.00
Electricity	218.00
Heat	236.00
Water	79.00
Propane	79.00
Maintenance personnel & Supplies	420.00
TOTAL:	$ 6,203.00

SCHEDULE "B"

DIVISION TO BE MADE OF REMAINING COMMUNITY AND COMPUTATION OF NOTE TO PETITIONER.

	Petitioner Husband	Respondent Wife
1. Cincinnati Residence (net value)	—0—	$28,230.00
2. Household Furnishings presently possessed by the parties	$ 100.00	3,300.00
3. Cash—Public National Bank 5 shares Aveco, U.S. Bonds, in husband's possession	1,700.00	—0—
4. U.S. Savings Bonds in wife's possession	—0—	150.00
5. U.S. Civil Service Annuity	18,831.00	—0—
6. Ohio Teachers $9,270.00 and Teachers Insurance $3,896.00	—0—	13,166.00
Adjustment to equalize:	$20,631.00	$44,846.00
	12,107.50	12,107.50
	$32,738.50	$32,738.50

Sum to be paid by Respondent to Petitioner:

Gross:	$12,107.50
Less Credit for Advances:	6,203.00
Promissory Note to Petitioner:	$ 5,904.50

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APPENDIX B

Opinion of the Court of Appeal of California

(Filed January 17, 1975)

1 Civil 33192

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

In re Marriage of Charles Baird Norris and Audrey Elizabeth Norris

---

CHARLES BAIRD NORRIS,
Respondent,

vs.

AUDREY ELIZABETH NORRIS,
Appellant.

Audrey Elizabeth Norris appeals from an interlocutory judgment ordering the dissolution of her marriage to Charles Baird Norris and establishing the community property rights of the respective parties. She challenges the jurisdiction of the court to dissolve the marriage on the ground that she is a resident of Ohio with no contacts with California and her husband did not establish a bona fide domicile. This position must yield to the substantial evidence rule, as must her argument that there existed an executed oral antenuptial agreement. We have also

concluded that the Family Law Act of 1970 is not unconstitutional as applied to the appellant, that the trial court did not abuse its discretion in denying her a continuance and that the court's division of pension rights must be upheld.

Relative to the contention that Mr. Norris did not establish a bona fide California residence and to Mrs. Norris' claim that she was entitled to the assets acquired during marriage by reason of the antenuptial oral agreement, there was a conflict in the evidence which was resolved by the trial court in favor of Mr. Norris.

The evidence disclosed that the parties were married in Washington, D.C., in 1947 and, a few years later, moved to Cincinnati where they resided until their separation in June of 1969. Both parties were gainfully employed during the marriage. Mrs. Norris was a schoolteacher, taught at the University of Cincinnati and obtained her Master's Degree. Mr. Norris was a lawyer employed by the Internal Revenue Service. Mr. Norris testified that the Internal Revenue Service assigned him to San Francisco at his request and that he intended to live in San Francisco. Prior to commencing divorce proceedings, Mr. Norris had resided in San Francisco for six months, fulfilling the requirements of section 4530(a) of the Civil Code. Mr. Norris denied that he had entered into any oral agreement. On both the issue of residence and the existence of an agreement, this court must follow the substantial evidence rule and resolve all conflicts in the evidence in favor of the trial court's findings. (Cooper v. Cooper (1969) 269 Cal. 2d 6, 8.)

We have also concluded that the trial court did not abuse its discretion in refusing appellant a continuance despite the fact that she had substantiated the fact that she was unable physically to come to California for the dissolution hearing. The trial court in exercising its discretion was entitled to take into consideration whether the rights

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of Mr. Norris would be jeopardized by a continuance (City of San Diego v. Walton (1947) 80 Cal.App.2d 206, 213) and whether Mrs. Norris had made a sufficient showing of the necessity of her appearance. (Thorpe v. Thorpe (1946) 75 Cal.App.2d 605, 607; In re Marriage of Brown (1972) 27 Cal.App.3d. 188, 191.) Mr. Norris' employment status was dependent upon an early resolution of his marital problem; Mrs. Norris made no showing of what evidence she could give relevant to either the question of domicile or irreconcilable differences. Mere statements that her testimony would be essential and that she needed to be present to "present evidence and testify as to important facts" is not a sufficiently specific showing in view of the earlier finding of the conciliation court that conciliation of the parties was not reasonably possible.

It is argued that a nonresident respondent in a dissolution action cannot challenge *in personam* jurisdiction without making a general appearance. Here, Mrs. Norris made a general appearance by her response to the petition for dissolution. (Code Civ. Proc., § 1014; Family Law Rule, § 1236.) No reason appears why she could not have made a special appearance as provided by Code of Civil Procedure section 418.10 to challenge *in personam* jurisdiction over herself and a special appearance to contest subject matter jurisdiction over the marriage. (See Rest., Judgments, § 39; 1 Witkin, Cal. Procedure, Jurisdiction, § 167, pp. 696-697.)

We do not agree with appellant that Civil Code section 4803 is unconstitutional as applied here. The definition of quasi-community property was expanded in 1970 by an amendment of Civil Code section 4803 to include all real, as well as personal property wherever situated, rather than only real property situated in California. Appellant argues that this amendment should not be applied to real property acquired prior to the enactment of the amendment, rely-

ing on the theory of *Estate of Thornton* (1934) 1 Cal. 2d 1. In *Thornton* the court held unconstitutional the application of a quasi-community property concept in a situation where the husband brought to California property acquired elsewhere in which his widow sought to establish community property rights upon his death. The underlying theory of *Thornton* has since been questioned and has been held inapplicable to the application of quasi-community property concepts in a divorce or separate maintenance action filed after domicile in California. (Addison v. Addison (1965) 62 Cal. 2d 558, 565-566; see 54 Cal. L. Rev. 252, *Marital Property and the Conflict of Laws: The Constitutionality of "Quasi-Community Property" Legislation.)* It is also noted that in this case, as in *Addison,* the judgment of dissolution was granted after the effective date of the legislation. (See 62 Cal.2d at 569.) *Rozan v. Rozan* (1957) 49 Cal.2d 322, cited by appellant, is not authority on the question of the court's power over marital interests in out-of-state property since the case was decided before Civil Code secion 146 (now Civil Code section 4800) was amended to cover quasi-community property.

Appellant's complaint that the California court could not indirectly affect title to real property in Ohio is not well taken. "It is well settled . . . that a court, with the parties before it, can compel the execution of a conveyance in the form required by the law of the situs and that such a conveyance will be recognized there. (Citations.)" *(Rozan v. Rozan, supra,* at p. 330.) Mrs. Norris was before the court as was Mr. Norris. Having made a general appearance without specially challenging *in personam* jurisdiction, she may not now complain of a lack of a constitutional basis for jurisdiction. (See *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 257-258.)

Appellant objects to the application of California law to dissolve a marriage which took place in another state.

BLEED THROUGH

Her objections again, however, center upon considerations appropriate to the Legislature. For example, she points to the possibility of encouraging forum shopping; she emphasizes the unfairness which may result to an innocent spouse in a no-fault divorce; she argues that no-fault divorce is an impairment of the obligation of contracts.

It is a recognized principle that the local law of the jurisdiction in which the action is brought will be applied to determine the right to divorce. (Rest. 2d Conflict of Laws, § 285; see *Williams v. North Carolina* (1942) 317 U.S. 287, 298-299.) The Family Law Act has been upheld against an attack on its constitutionality. (In re Marriage of Cosgrove (1972) 27 Cal.App.3d 424, 429.) In *Cosgrove*, the court pointed out that: "The guidelines for the proof and determination of the existence of 'irreconcilable differences' are no more lacking in the present law than were the guidelines for the determination of fault under the former law. The rights of the responding party who elects to oppose the dissolution of the marriage are fully protected. The procedures prescribed for exhausting all reasonable efforts to save the marriage by reconciliation demonstrate the continuing concern of the law for the preservation of the marriage wherever possible." Appellant seeks to distinguish this case from *Cosgrove* by pointing out that the appellant in *Cosgrove* did not deny the existence of irreconcilable differences in her response to the petition. The court in *Cosgrove* noted this fact in pointing out that the appellant did not contend that any available reconciliation procedures had not been utilized. Here, too, the appellant did not so contend and, in fact, availed herself of the procedures of the conciliation court.

Mrs. Norris' final contention is that the trial court erred in the valuation of their respective pension rights.

Mr. Norris' pension rights in the Civil Service Retirement System were valued at $18,831.00 and Mrs. Norris'

rights in the Ohio Teachers Retirement System were valued at $11,570.00. Both figures represented the amount the parties would receive were they to leave their employment at the time of valuation. Neither party had retired or reached the age when they were eligible to retire. At the trial, Mrs. Norris took the position that Mr. Norris had a right to retire at that time and receive a disability pension but this was denied by Mr. Norris who testified that he did not have the right to a pension unless he completed further time.

"The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. (Citations.)" *(In re Marriage of Fithian* (1974) 10 Cal. 3d 592, 596.) The court in *Fithian* noted that "The right to retirement benefits 'vests' when an employee acquires an irrevocable interest in a fund created by his own contributions and/or the contributions of his employer. The 'vesting' of retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (Citations.)" (10 Cal.3d, 596, fn. 1)

The only portion of Mr. Norris' pension rights which had vested was the amount of $18,831.00 since, according to the testimony, the right to the pension, rather than just the payment of the pension, had to await the age of 55. The court, therefore, did not err in refusing to value the pension on an actuarial basis.

The rule that pension benefits which have not yet vested are a mere expectancy and not subject to division as community property was articulated in *French v. French* (1941) 17 Cal.2d 77, 77. The Supreme Court in *In re Marriage of Wilson* (1974) 10 Cal.3d 851, 853, an-

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nounced that it had granted a hearing in that case in order to ascertain the current viability of the *French* rule. The court declined to do so, however, because the record revealed that the respondent wife expressly acquiesced in the *French* rule at the trial level and had not appealed from that portion of the judgment adverse to her interests. The rule of *French v. French* thus remains and controls this case.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.
Good, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of Judicial Council.

APPENDIX C

Judgment of the Supreme Court of California

(Filed March 12, 1975)

Order Due March 18, 1975

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
1st DISTRICT, DIVISION 3, CIVIL No. 33192

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA IN BANK

IN RE MARRIAGE OF NORRIS

NORRIS

v.

NORRIS

Appellant's petition for hearing DENIED.

/s/ WRIGHT
Chief Justice

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I.

Mrs. Norris was not deprived of due process of law at the first hearing 2

II.

The Civil Service retirement annuity was properly valued 3

Conclusion 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1547

AUDREY ELIZABETH NORRIS,
Petitioner,

vs.

CHARLES BAIRD NORRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF CASE

This case involves a marital dissolution proceeding instituted in California by respondent Charles Baird Norris. The uncontradicted evidence in the case indicated that respondent was permanently transferred to and was a resident of California at the time of these proceedings. There were two hearings; the first dealt with the dissolution of the marriage because of irreconcilable differences of the parties; the second dealt with the issues of property, support and counsel fees.

BLEED THROUGH

ARGUMENT

I.

MRS. NORRIS WAS NOT DEPRIVED OF DUE PROCESS OF LAW AT THE FIRST HEARING

Mrs. Norris was not deprived of any constitutional rights in the hearing on the issue of the dissolution of the marriage (the later hearing dealing with the property of the parties and support were participated in by petitioner and counsel).

Mrs. Norris entered a general appearance in this matter and was actively represented by counsel throughout these proceedings. Mrs. Norris had filed a petition for reconciliation which can, at best, be regarded as frivolous in which she refers to the care and custody of her 9 dogs.

The argument presented herein by petitioner was rejected by the California Court of Appeal (see Appendix A) which stated inter alia:

> "We have also concluded that the trial court did not abuse its discretion in refusing appellant a continuance despite the fact that she had substantiated the fact that she was unable physically to come to California for the dissolution hearing. The trial court in exercising its discretion was entitled to take into consideration whether the rights of Mr. Norris would be jeopardized by a continuance (*City of San Diego v. Walton* (1947) 80 Cal. App. 2d 206, 213) and whether Mrs. Norris had made a sufficient showing of the necessity of her appearance. (*Thorpe v. Thorpe* (1946) 75 Cal. App. 2d 605, 607; *In re Marriage of Brown* (1972) 27 Cal. App. 2d 188, 191.) Mr. Norris' em-

ployment status was dependent upon an early resolution of his marital problem; Mrs. Norris made no showing of what evidence she could give relevant to either the question of domicile or irreconcilable differences. Mere statements that her testimony would be essential and that she needed to be present to 'present evidence and testify as to important facts' is not a sufficiently specific showing in view of the earlier finding of the conciliation court that conciliation of the parties was not reasonably possible."

II.

THE CIVIL SERVICE RETIREMENT ANNUITY WAS PROPERLY VALUED

The court did not err in the valuation of Mr. Norris' civil service annuity at current vested account balance of over $18,000.00. The uncontradicted evidence showed that Mr. Norris would receive that amount if he terminated employment at the time of the trial. He had no immediate retirement rights other than to those amounts in his account since he had not reached even early retirement age.

Additionally, there was not even an offer of proof of the alleged actuarial value of this account (which would have to be premised on the condition that Norris would continue employment until a later date certain to qualify for early retirement) at the trial of this matter.

Parenthetically, Mrs. Norris' teacher's retirement annuity was valued in the same fashion as Mr. Nor-

ris' benefit. No fault was found with this portion of the judgment.

Petitioner completely misstates the court's finding in this case. The court awarded one-half (½) of Mr. Norris' *vested* pension to Mrs. Norris. The court, however, concluded that any other sums would be mere speculation. It was the vested portion that was distributed; there was no *expectancy* that could be *vested* since Norris had not met any of the conditions for retirement at the time of the dissolution.

CONCLUSION

The petitioner herein appeared in the California action. She retained able counsel who participated throughout the proceedings. There is no evidence that she was deprived of any substantive rights nor deprived at any stage of the various hearings of due process of law.

Dated, San Francisco, California,
June 30, 1975.

Respectfully submitted,

MOLINARI, CASALNUOVO & BERGER,
A PROFESSIONAL CORPORATION,
LEONARD B. BERGER,
Attorneys for Respondent.

(Appendix Follows)

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 33,192
(Sup. Ct. No. 625 361)

In re Marriage of Charles Baird Norris and Audrey Elizabeth Norris
Charles Baird Norris, Respondent, vs. Audrey Elizabeth Norris, Appellant.

[Filed Jan. 17, 1975]

OPINION

Audrey Elizabeth Norris appeals from an interlocutory judgment ordering the dissolution of her marriage to Charles Baird Norris and establishing the community property rights of the respective parties. She challenges the jurisdiction of the court to dissolve the marriage on the ground that she is a resident of Ohio with no contacts with California and her

husband did not establish a bona fide domicile. This position must yield to the substantial evidence rule, as must her argument that there existed an executed oral antenuptial agreement. We have also concluded that the Family Law Act of 1970 is not unconstitutional as applied to the appellant, that the trial court did not abuse its discretion in denying her a continuance and that the court's division of pension rights must be upheld.

Relative to the contention that Mr. Norris did not establish a bona fide California residence and to Mrs. Norris' claim that she was entitled to the assets acquired during marriage by reason of the antenuptial oral agreement, there was a conflict in the evidence which was resolved by the trial court in favor of Mr. Norris.

The evidence disclosed that the parties were married in Washington, D.C., in 1947 and, a few years later, moved to Cincinnati where they resided until their separation in June of 1969. Both parties were gainfully employed during the marriage. Mrs. Norris was a school teacher, taught at the University of Cincinnati and obtained her Master's Degree. Mr. Norris was a lawyer employed by the Internal Revenue Service. Mr. Norris testified that the Internal Revenue Service assigned him to San Francisco at his request and that he intended to live in San Francisco. Prior to commencing divorce proceedings, Mr. Norris had resided in San Francisco for six months, fulfilling the requirements of section 4530(a) of the Civil Code. Mr. Norris denied that he had entered

into any oral agreement. On both the issue of residence and the existence of an agreement, this court must follow the substantial evidence rule and resolve all conflicts in the evidence in favor of the trial court's findings. (Cooper v. Cooper (1969) 269 Cal.App.2d 6, 8.)

We have also concluded that the trial court did not abuse its discretion in refusing appellant a continuance despite the fact that she had substantiated the fact that she was unable physically to come to California for the dissolution hearing. The trial court in exercising its discretion was entitled to take into consideration whether the rights of Mr. Norris would be jeopardized by a continuance (City of San Diego v. Walton (1947) 80 Cal.App.2d 206, 213) and whether Mrs. Norris had made a sufficient showing of the necessity of her appearance. (Thorpe v. Thorpe (1946) 75 Cal.App.2d 605, 607; In re Marriage of Brown (1972) 27 Cal.App.3d 188, 191.) Mr. Norris' employment status was dependent upon an early resolution of his marital problem; Mrs. Norris made no showing of what evidence she could give relevant to either the question of domicile or irreconcilable differences. Mere statements that her testimony would be essential and that she needed to be present to "present evidence and testify as to important facts" is not a sufficiently specific showing in view of the earlier finding of the conciliation court that conciliation of the parties was not reasonably possible.

It is argued that the nonresident respondent in a dissolution action cannot challenge *in personam* juris-

diction without making a general appearance. Here, Mrs. Norris made a general appearance by her response to the petition for dissolution. (Code Civ. Proc., § 1014; Family Law Rule, § 1236.) No reason appears why she could not have made a special appearance as provided by Code of Civil Procedure section 418.10 to challenge *in personam* jurisdiction over herself and a special appearance to contest subject matter jurisdiction over the marriage. (See Rest., Judgments, § 39; 1 Witkin, Cal. Procedure, Jurisdiction, § 167, pp. 696-697.)

We do not agree with appellant that Civil Code section 4803 is unconstitutional as applied here. The definition of quasi-community property was expanded in 1970 by an amendment of Civil Code section 4803 to include all real, as well as personal property wherever situated, rather than only real property situated in California. Appellant argues that this amendment should not be applied to real property acquired prior to the enactment of the amendment, relying on the theory of *Estate of Thornton* (1934) 1 Cal.2d 1. In *Thornton* the court held unconstitutional the application of a quasi-community property concept in a situation where the husband brought to California property acquired elsewhere in which his widow sought to establish community property rights upon his death. The underlying theory of *Thornton* has since been questioned and has been held inapplicable to the application of quasi-community property concepts in a divorce or separate maintenance action filed after domicile in California. (Addison v. Addi-

son (1965) 62 Cal.2d 558, 565-566; see 54 Cal.L.Rev. 252, *Marital Property and the Conflict of Laws: The Constitutionality of "Quasi-Community Property" Legislation.*) It is also noted that in this case, as in *Addison,* the judgment of dissolution was granted after the effective date of the legislation. (See 62 Cal. 2d at 569.) *Rozan v. Rozan* (1957) 49 Cal.2d 322, cited by appellant, is not authority on the question of the court's power over marital interests in out-of-state property since the case was decided before Civil Code section 146 (now Civil Code section 4800) was amended to cover quasi-community property.

Appellant's complaint that the California court could not indirectly affect title to real property in Ohio is not well taken. "It is well settled . . . that a court, with the parties before it, can compel the execution of a conveyance in the form required by the law of the situs and that such a conveyance will be recognized there. (Citations.)" (Rozan v. Rozan, supra, at p. 330.) Mrs. Norris was before the court as was Mr. Norris. Having made a general appearance without specially challenging *in personam* jurisdiction, she may not now complaint of a lack of a constitutional basis for jurisdiction. (See McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 257-258.)

Appellant objects to the application of California law to dissolve a marriage which took place in another state. Her objections again, however, center upon considerations appropriate to the Legislature. For example, she points to the possibility of encour-

aging forum shopping; she emphasizes the unfairness which may result to an innocent spouse in a no-fault divorce; she argues that no-fault divorce is an impairment of the obligation of contracts.

It is a recognized principle that the local law of the jurisdiction in which the action is brought will be applied to determine the right to divorce. (Rest. 2d Conflict of Laws, § 285; see Williams v. North Carolina (1942) 317 U.S. 287, 298-299.) The Family Law Act has been upheld again an attack on its constitutionality. (In re Marriage of Cosgrove (1972) 27 Cal. App.3d 424, 429.) In *Cosgrove,* the court pointed out that: "The guidelines for the proof and determination of the existence of 'irreconcilable differences' are no more lacking in the present law than were the guidelines for the determination of fault under the former law. The rights of the responding party who elects to oppose the dissolution of the marriage are fully protected. The procedures prescribed for exhausting all reasonable efforts to save the marriage by reconciliation demonstrate the continuing concern of the law for the preservation of the marriage wherever possible." Appellant seeks to distinguish this case from *Cosgrove* by pointing out that the appellant in *Cosgrove* did not deny the existence of irreconcilable differences in her response to the petition. The court in *Cosgrove* noted this fact in pointing out that the appellant did not contend that any available reconciliation procedures had not been utilized. Here, too, the appellant did not so contend and, in fact, availed herself of the procedures of the conciliation court.

Mrs. Norris' final contention is that the trial court erred in the valuation of their respective pension rights.

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"The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. (Citations.)" (In re Marriage of Fithian (1974) 10 Cal.3d 592, 596.) The court in *Fithian* noted that "The right to retirement benefits 'vests' when an employee acquires an irrevocable interest in a fund created by his own contributions and/or the contributions of his employer. The 'vesting' of retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (Citations.)" (10 Cal.3d 596, fn.1)

BLEED THROUGH

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The rule that pension benefits which have not yet vested are a mere expectancy and not subject to division as community property was articulated in *French v. French* (1941) 17 Cal.2d 775, 777. The Supreme Court in *In re Marriage of Wilson* (1974) 10 Cal.3d 851, 853, announced that it had granted a hearing in that case in order to ascertain the current viability of the *French* rule. The court declined to do so, however, because the record revealed that the respondent wife expressly acquiesced in the *French* rule at the trial level and had not appealed from that portion of the judgment adverse to her interests. The rule of *French v. French* thus remains and controls this case.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Good, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of Judicial Council.

BLEED THROUGH